

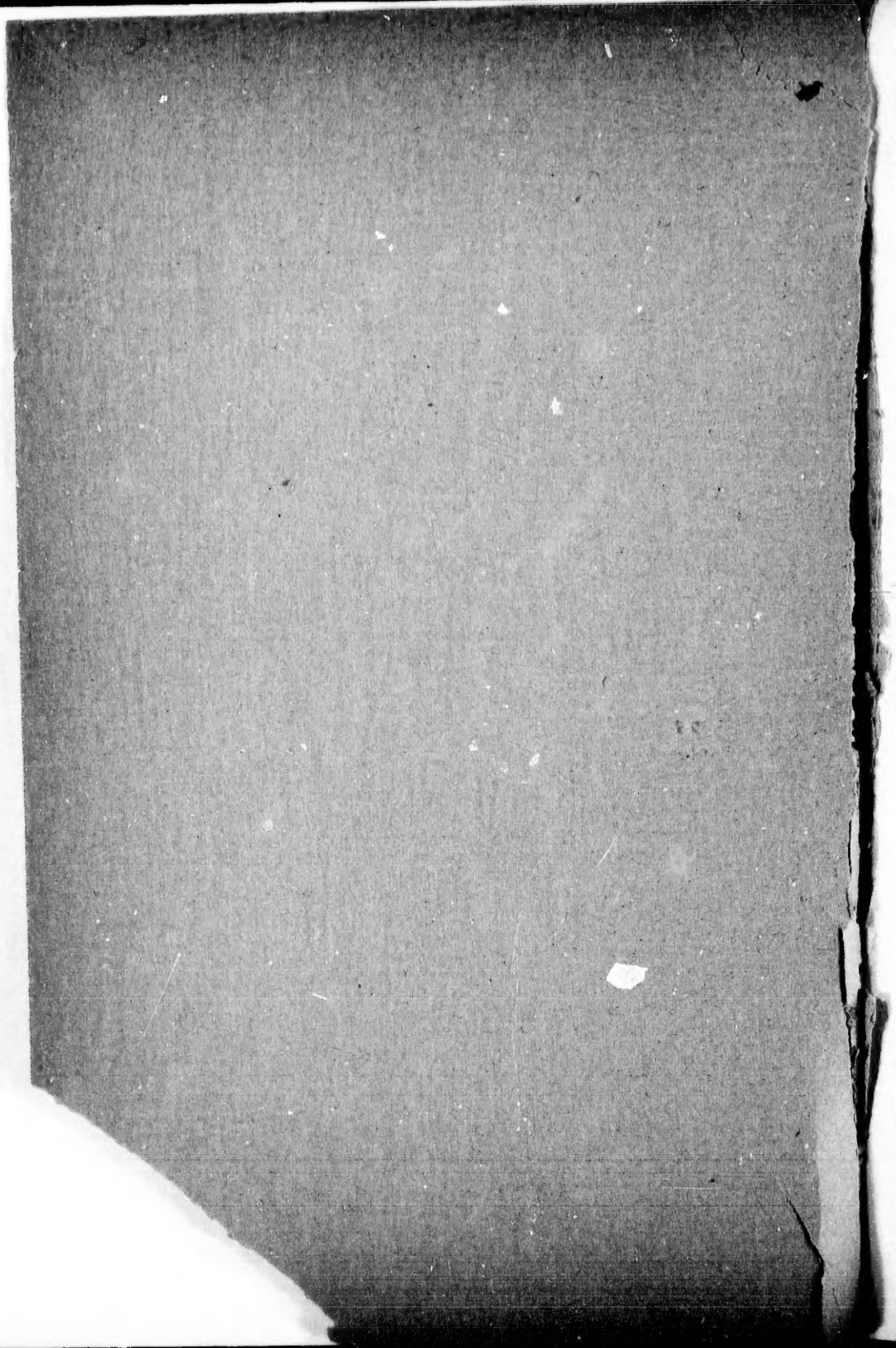


WINNOWINGS IN AMERICAN HISTORY.

---

FISHERIES SERIES.

No. I.



WINNOWINGS IN AMERICAN HISTORY.

---

FISHERIES SERIES.

No. I.

250 copies printed.

No. 137



A Letter to Albert Gallatin,  
on the French Claims to  
the Newfoundland Fish-  
eries, written Oct. 1, 1822.

BY

RICHARD RUSH.

---

BROOKLYN, N. Y.:  
HISTORICAL PRINTING CLUB.  
1890.

54229

R 40

## NOTE.

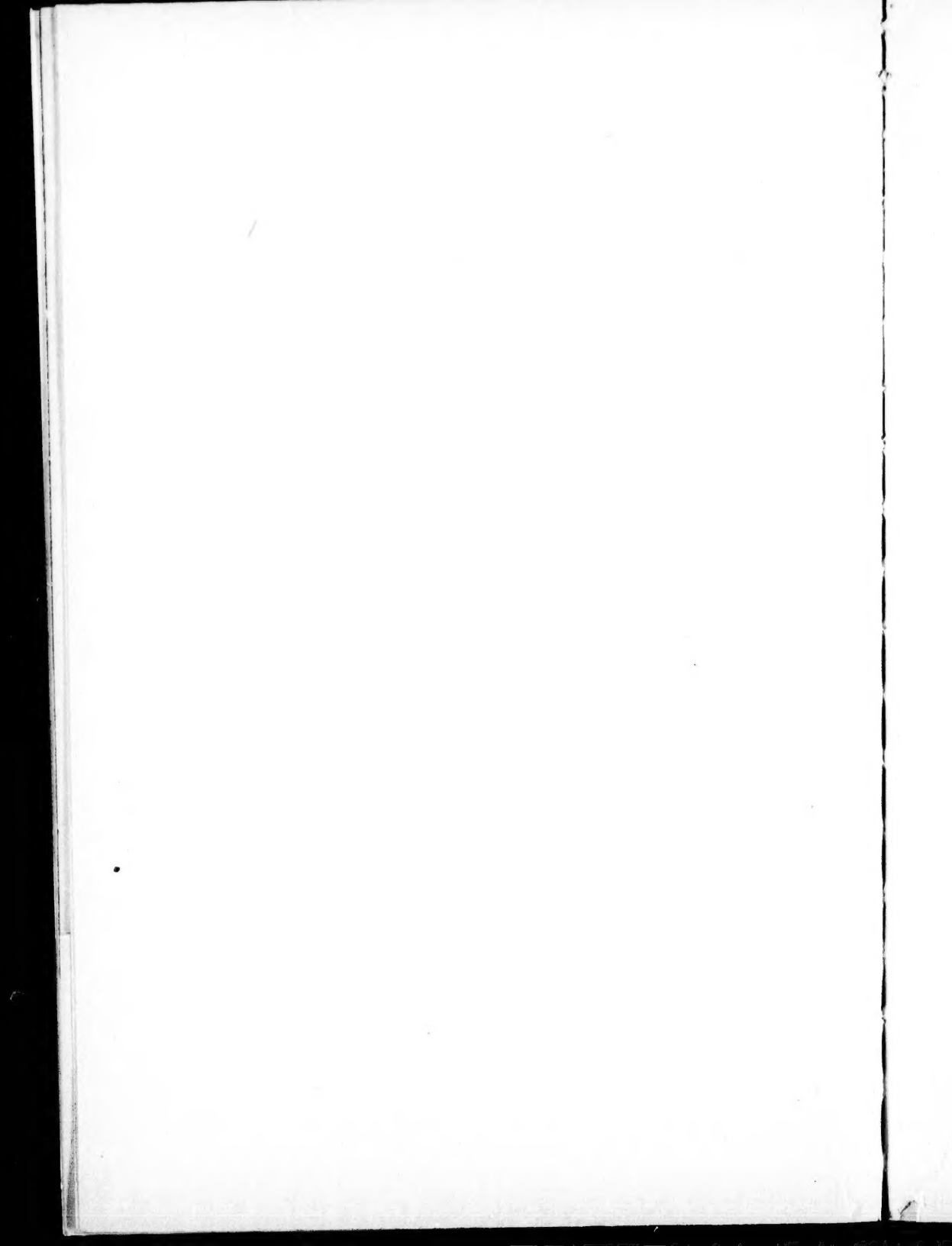
---

THE following letter, printed from the original manuscript in the possession of Mr. Gordon L. Ford, relates to the claim of France to the west coast Newfoundland fisheries, the discussion of which has been so recently revived. Though the matter has ceased to be a question in which the United States is directly interested, it nevertheless has a bearing on our own claims, and is a necessary part of the whole subject of American Fisheries.

PAUL LEICESTER FORD.

*97 Clark St., Brooklyn, N. Y.*





LONDON, OCTOBER 10, 1822.

*His Excellency ALBERT GALLATIN,  
Envoy Extraordinary and Minister  
Plenipotentiary from the United  
States—Paris.*

DEAR SIR :

I received your letter of the ninth of last month, and if I have delayed answering it until now, it has only been that I might improve the interval in endeavoring to obtain such further matter upon the subject of it, as might give to my letter the chance of being acceptable to you.

A short time after our convention with this court of 1818, the general assembly of Nova Scotia took the subject of it up, making it the foundation of a memorial to the Prince Regent. In the course of this memorial,

heavy complaints were urged against the ministry for arranging the question of the fisheries with us, as by the first article of the convention. A considerable body of evidence upon this and other points, was laid before the assembly and the whole proceedings published in a volume in 1819. For this volume I have made every inquiry among booksellers and other persons in London, as it would probably throw light upon our discussion, but hitherto without success. Doubtless it must be in the foreign or colonial office, but I have not as yet tried these sources. A portion of its contents appeared in the London Times of September the 4th 1819, but nothing that materially subserves our purpose. I have also examined the parliamentary debates of March and April 1786, to which Anspach refers, but find nothing in them that touches the question of con-

flicting claims as between England and France, to any part of the coast of Newfoundland. Nor do I find in Reeves's history of the government of Newfoundland, a copy of which I procured through the author, there being none on sale, any thing upon the subject, or any notice of the proclamation mentioned in my letter of the thirtieth of August.

The more I reflect upon the whole subject, the more I become satisfied that France cannot support a claim to an exclusive fishery upon any part of that coast. Historically, this Island must be looked upon as English from the very beginning, for although claims are put in to its earlier discovery by the French, the Biscayners, and perhaps by other nations, the best accounts ascribe its discovery to Cabot, in Henry the seventh's time. The first colonial establishments there, of

any such deserving the name, were by the English, and these they continued to follow up with more effect than any rival nation. If any other nation can ever make out a prior right to fish off the Island, the earliest and best claim to sovereignty over it belongs to England, who left its harbours and fishing places open and free to other nations, but always without prejudice to her own sovereignty. Whatever *concurrent claims* other nations may have set up to it, or whatever *concurrent rights* England may have yielded in their favor, she has never at any time, by her own act, parted with a tittle of this sovereignty. She has never made a grant, that I can discover, of any part of the Island, bearing to be exclusive, whether for fishing or other purposes. We find on the contrary constant complaints from her of the encroachments of the French in that quarter,

whose settlements at Placentia do not however appear to have been made earlier than 1662. These encroachments the English colonists of New England, particularly those of a later day, did their full share to beat back, though Anspach has no notice of their efforts. We have Burnet's authority for saying, that France was called upon to pay, and did actually pay, tribute for the privilege of fishing there, in the time of Charles the second.

I have said that it does not appear that England has ever yielded up any exclusive rights to any part of the Island. Perhaps to this assertion there is an exception, and, as far as I have yet examined the treaties between England and France, but a single one. The exception will be found in the "treaty of peace, good correspondence, and neutrality in America," between

the two nations, of November 16, 1686. By the 5th article of this treaty it is provided, "that both kings shall enjoy all the rights &c they are now possessed of in America," France in point of fact holding settlements and possessions in Newfoundland at that time. By the 6th article it is stipulated "that the subjects of neither shall trade, fish &c *within the precincts of the other*, and if any ship be found so doing, it shall be confiscated." Now, I deduce from this treaty an argument of some weight in favor of our position. It is seen that when England intended to pass, and France to be put in possession of, an exclusive right, proper words are employed to that effect. The Island, by the operation of the clauses cited, was placed in a certain state of division between the two countries, the right of each being made exclusive. Where shall we find

any words of equivalent import and strength in the treaty or declaration of 1783? It may be proper to remark, that although this treaty of 1686 was binding upon England, it was complained of by English subjects as derogatory to the statute of 15. Charles 2<sup>nd</sup>. ch. 16, as that statute has prescribed several regulations relating to the mode of carrying on the fishery, to be observed *in any of the harbours of Newfoundland*. We may gather hence how jealous was the English feeling as to all positive grants of *exclusive* rights to any other nation, and how necessary express words must have been accounted to pass such rights.

Waving all further references to the early history of the Island, which however cannot be without their use in seeking light upon a point that may be thought of doubtful construction, it



is sufficient that, by the treaty of Utrecht, the absolute sovereignty of it passed to England. The war that preceded, had thrown nearly the whole of it into the hands of France, but the peace reinstated as well the possession as the sovereignty of England; and it is obvious that France herself is obliged to rest the whole of her claims upon the stipulations contained in her favor in the 13th article of this treaty. With whatever perseverance these claims have been urged by France as giving her exclusive rights, they have been as constantly resisted by England, who has treated them only as concurrent. You will have seen what Anspach says about the disputes between the two countries as to the real situation of Pointe Riche (a passage that perhaps leaves the more impression upon us from the share that Prior the poet had in the negotiations,) and

also that in setting out the English declaration of war against France in the time of William III, he shows that the encroachments of the French upon the rights of the English in Newfoundland are described as having been "more like the invasions of an enemy, than becoming friends who enjoyed the advantages of that trade only *by permission*." I am the more particular in recalling these words as I think that they give us the true explanation of the real ground upon which the French fishing rights at Newfoundland rest at the present day.

I have obtained access to some parliamentary papers which contain matter highly pertinent to our discussion. As I cannot procure them for your use (they have only been borrowed for my own, through the attention of Colonel Aspinwall) I will proceed to apprise you of such portion of their

contents, as is most material. They consist of, 1<sup>st</sup> a "copy of a representation of the lords commissioners for trade and plantations, to his majesty, relating to the Newfoundland trade and fishery," dated December the 19th 1718. 2. A paper with the same title, dated April the 29th 1765. And 3<sup>rd</sup>, a paper entitled "Report of the Lords of the committee of privy council for trade, on the subject of the Newfoundland fishery," dated the 17th of March 1786. These were all documents printed by order of parliament in 1793. The two first are filled with details of the manner of carrying on the fishery from the earliest times to the period of their dates, embracing a reference to all the regulations by statute or otherwise upon the subject, and containing notices also of the disputes between France and England that so often existed in relation to it.

These details are chiefly historical, and are no further necessary to be adverted to than as they go to show that England has never renounced any of her rights to this fishery in any one instance. The most that she has done has been to allow France a co-equal enjoyment in them, sometimes indefinitely, sometimes in parts and places that have been specified; sometimes exacting tribute for the enjoyment, and sometimes foregoing it.

The third is the document of chief importance, because it has direct reference throughout to the treaty of 1783, and seems to have been produced by that treaty. We will follow its principal passages.

"It is agreed" says this Report, "by all your majesty's officers, that the part of Newfoundland allotted by the late treaty of peace (1783) to the French for carrying on their fishery, is

not so well adapted for that purpose as that where we fish exclusively; and although the cod is as large on that part of the Island where the French are allowed to fish, the climate is more unfavorable for drying it." And again, "As the French are not allowed to winter there, they arrive too late to prepare their stages, flakes &c and to get the stuff out of the woods for the purpose of covering them, so that they are obliged to cover them with ships sails, which is more expensive, and does not answer so well." The Report, after dwelling on the superiority of the English mode of carrying on the fishery over the French, goes on to say, that the committee are therefore of opinion that it would be "highly expedient to prevent all intercourse whatsoever between your majesty's subjects, whether resident *or fishing*, at Newfoundland, and those of any foreign

nation whatsoever, not only for the purpose now suggested (a purpose growing out of the alleged superiority of the English fishermen) but for that of preventing all illicit commerce with foreign nations." The Report recommends that no French subjects be allowed to remain in the Island after the fishing season is over, and that no British subject be allowed to prepare any boat, stage, or flake for them against the ensuing season, and it concludes in the following manner especially worthy of our attention. "The merchants who attended the committee frequently expressed a desire of knowing whether British subjects had a right to fish, and to dry fish, within the limits where the French are by the late treaty allowed to carry on their fishery; and at the same time complained that several of your majestys subjects had been ordered by the

commanders of French men of war to remove from within these limits. The committee did not think themselves sufficiently informed or authorized to answer this question. The doubt arises from the manner in which the duke of Manchesters declaration of September 3. 1783 is worded, and can only be satisfactorily cleared up by reference to the correspondence which passed on that occasion. But the committee are decidedly of opinion that by the words of the treaty your majesty continues to be the sole sovereign of the Island of Newfoundland. And if it shall be the opinion of your majestys ministers that British subjects ought no longer to fish in concurrence with the French within the limits above mentioned, they should be obliged to remove by the orders of your majestys governors, or the commanders of your majestys ships of

war authorised by your majestys instructions for that purpose, and not by those of the French officers who may happen to be on that coast, and who in cases of contravention should not be allowed to exercise any authority upon your majesty's Island of Newfoundland, but should make complaint and apply to your majestys said governor, or the officers who act under him, for redress."

I think that the whole tenor of these extracts leads to the conclusion for which we contend. They show that however England may have been inclined, for her own purposes or as matter of \* \* \* accommodation to France, to withdraw her subjects from the western coast, she has never lost her right to resort there, in any manner that can bar us. *The Committee are decidedly of opinion, that by the words of the treaty, your majesty con-*



*tinues to be the sole sovereign of the Island of Newfoundland.* This is our argument. It is that upon which foreign nations will stand, and we in particular, under our convention with England of 1818. If it shall be thought, continues the Report, that "British subjects *ought* no longer to fish in concurrence with the French within the limits above mentioned, they should be obliged to remove by orders of your majestys governors, or the commanders of your majestys ships of war, authorised for that purpose." The phraseology of this passage shows the contemporaneous understanding of the treaty and declaration to have been, not that England was bound as matter of positive obligation to interdict her subjects from the western coast, but only that, from sufficient motives, she might perhaps intend to exercise the *option*

of doing so. The expression "*ought* no longer to fish" is proper to be remarked, not as a verbal criticism, but as pointing to a real distinction between a stipulation of primary and indispensable obligation, and a disposition to adopt the measure resting upon the voluntary determinations of the British crown. We are furnished too in this part of the Report with another exception to the proceedings of France; viz., her assumption of the attributes and character of Sovereign of the Island in ordering away our vessels. Whatever rights she has, are manifestly under the tenure of England, to whom therefore her complaints for redress, if they could be supported, would have been more regularly addressed.

There seem to be good reasons why England might have felt inclined, as a measure of expediency on her own

side, to keep her subjects away from the western coast, and let the French fish there by themselves, though cautious not to give up her right. For, first, this report confirms the opinion and testimony of the officers designated by Admiral Keppel to give an opinion on the true nature of the fishing ground on the western coast. It affirms it to be inferior to the places where the English fished, if not as to the quality of the fish taken, at least in the article of drying. Hence it is no forced construction to suppose, that England might of her own accord have felt willing to forego for a time her concurrent right of fishing on a part of the coast which she believed, whatever may have been the real fact, to be less advantageous than other parts which she possessed *exclusively* all round the Island. 2ndly The whole history of this fishery shows a

jealousy on the side of the English of all interference with their fishermen on the part of the French. France would probably ascribe this jealousy to the superior success with which she managed her fishing concerns. England on the other hand believing in the superior skill of her own fishermen, and the superior quality of their equipments, seems to have been desirous to confine the effects of each to herself, a result which keeping the fishermen of the two nations apart would have been the most natural means of accomplishing. She not only had alleged that her fishing boats were larger and all her fishing utensils better than those of the French, but also that the French had been in the habit of encouraging the desertion of the British fishermen to get the benefit of their dexterity. It was doubtless under these inducements of real or

presumed superiority in the British fishermen, that we find the Report recommending not only that no Frenchman be allowed to remain in the Island after the fishing season, (the declaration as we know forbids their wintering there,) but that "no British subject be allowed to prepare any boat, stage, or flake" for them against the next season; and further recommending even that all intercourse should be prohibited between British subjects either "resident or *fishing*" and those of any foreign nation at Newfoundland. A further and perhaps still stronger motive for this prohibition of all intercourse, aimed chiefly if not exclusively at France, was, that all opportunities of illicit trade and smuggling might be cut off. When the boats and subjects of the two nations intermixed, the French were known to supply the

English with many articles which they wanted or which at any rate were acceptable to them, particularly brandies, whereas it had ever been the policy of England, which she aimed at adhering to most rigorously in practice, that her fishermen should receive the whole of their supplies from England. Such views of the subject are I think sufficient to authorise the conjecture, that England may have contemplated a spontaneous inhibition to her subjects of the Western coast, without intending that the consequent exclusive enjoyment of it by French fishermen should be any thing more than a temporary usufructuary, and by no means a right. It is possible that intimations to this effect may have had place during the negociations of the treaty, since it is not otherwise easy to account in all respects for the nature of the debates upon it which we have

seen. These considerations strengthen me also in the inference, that the declaration was superadded to the treaty in order to afford every possible latitude of accommodation to France in the matter of fishing on that coast, consistently with avoiding a surrender of the British right.

I have stated that there is no notice in Reeves of the proclamation said to have been issued by the governor of Newfoundland, to exclude British fishermen from the Western coast; nor do I find in the body of his history any thing necessary to remark upon. But in an appendix to it, the acts of parliament relative to this fishery are collected, and among them is one which, if it has not before met your attention, and it had not mine, you will find very material. It is the act of 28. Geo. III., ch. 35, entitled "an act to enable his majesty to make such regulations as

may be necessary to prevent the inconvenience which might arise from the competition of his majesty's subjects and those of the most christian king in carrying on the fishery on the coasts of the Island of Newfoundland." It is founded expressly upon those parts of the treaty of 1783, and of the declaration, which relate to this fishery. The act begins by a full recital of the 13th article of the treaty of Utrecht, still considering this as the true root and limit of the French right. It next recites the 5th article of the treaty of Paris of 1763, as confirming the 13th article of the treaty of Utrecht; then we have the 5th article of the treaty of 1783 also set forth, as well as all those parts of the declaration which relate to the fishery. After this preamble, and stating also that "it is expedient in conformity to the definitive treaty of peace and the



declaration aforesaid that his majestys subjects should be prevented from interrupting in any manner, by their competition, the aforesaid fishery of the subjects of his most christian majesty, during the temporary exercise thereof which is granted to them on the coast of Newfdland, and that all permanent establishments on that part of the coast allotted to the French fishermen should be removed, and that such fishermen should be in no manner molested, contrary to the tenor of the said treaty and the good faith thereof," the act proceeds thus: "In order therefore that his majesty may be the better enabled to carry the said several treaties and declarations into faithful and punctual execution, (thereby evidently considering *the whole* as one series and not that *the declaration* had created any new or substantive rights,) and to make such regulations

as may be expedient respecting the fishery, be it enacted, that it shall and may be lawful for his majesty, his heirs and successors, by advice of council, from time to time, to give such orders and instructions to the governors of Newfoundland, or to any officer or officers on that station, *as he or they shall deem proper and necessary* to fulfil the purposes of the definitive treaty and declaration aforesaid; and, *if it shall be necessary to that end*, to give orders to the governor, or other officer or officers aforesaid, to remove any stages, flakes, trainvats, or other works for the purpose of carrying on fishery, erected by his majesty's subjects on that part of the coast of Newfoundland which lies between cape St. John, passing to the north, and descending by the western coast of the said Island to the place called cape Raye; and also ships ves-

sels and boats belonging to his majestys subjects which shall be found within the limits aforesaid, and also in case of refusal to depart from within the limits aforesaid, to compel any of his majesty's subjects to depart from thence, any law, usage or custom to the contrary notwithstanding." Here closes the section.

*"And if it shall be necessary to that end* British subjects and their ships vessels and boats, are to be removed from these limits. That is, if the governor or other officer or officers at Newfoundland, should deem such a measure necessary and proper for fulfilling the purposes of the definitive treaty and declaration, *not otherwise*. It is thus that I understand the act. No peremptory duty is enjoined, but, on the contrary, words could not be more appropriate to imply a discretion. Had the treaty or declaration

been considered as vesting an absolute right in France to an exclusive fishery within these limits, the words of the act of parliament must have been equally absolute, or the English nation would have failed in acting up to the good faith pledged in the declaration. It is highly necessary to be kept in mind, that no such measure of exclusion as against British subjects or their ships or vessels, appears ever, in point of fact, to have been taken by the governor at Newfoundland, or by any authority whatever *emanating from Britain*. I have not been able at least to find any trace of such a measure. If any such *were* taken, it could not extinguish the English right, but would at most amount to a temporary suspension of its enjoyment, and if never taken, it fortifies the construction that would declare the act to be in the alternative, leaving it with

the discretion of Britain to order her ships and subjects away or not, according to circumstances. The great object was, that the English fishermen should be restrained from molesting in any manner the French fishermen, *or interrupting* them by their competition. *The right of competition* is not taken away, and if it were found that its exercise could be regulated so as not to *interrupt* the French, otherwise than by the English vessels being actually ordered away from the coast, then England was not called upon to order them away. The omission of all notice of any proclamation, or other act, to this effect in Reeves, whose book was written in 1793, as well as in Anspach, whose work is of a date so much more recent, goes far, as negative proof, to show that none such was issued; and it is evident from the Report of the lords of the committee of privy coun-

cil for trade, that up to the date of that instrument, (March 1786) there had been no prohibition of British subjects, *except on the part of France herself*. Of this, as has been seen, the committee complain, as of a step irregular, if not offensive. Hence, whilst my course of reasoning goes upon the supposition that Great Britain might have felt no abstract repugnance to the keeping of her subjects and vessels away from these limits, the case is still stronger for her if she did not in point of fact find it necessary for any purpose of justice towards France to keep them away, and whether she did or not, cannot affect the United States, there being nothing upon the face of the treaty or declaration by which she was bound to keep them away; in other words nothing that extinguishes her concurrent right.

For conclusion, at present, I will

call your attention to the title of this act of parliament, as a confirmation of our reasoning. It is not to *prevent a competition*, but to *prevent the inconvenience that might arise from a competition*. It thus presupposes that a competition was to exist. It follows, that the scene of it could be nowhere else than within the limits in question, since *to every other part of the coast the English right was beyond all doubt exclusive*. The object of the act therefore must have been, so to regulate this competition as to fulfil, in a reasonable and adequate manner, the engagements of the declaration, and leave to France no just cause of complaint.

October the 29th. I had written the foregoing sheets and was waiting a little leisure to copy and send them to you, when I received a note from Mr. Robinson, requesting me to call at the

office of the Board of Trade. I accordingly had an interview with him there on the 25th of this month. It was upon the subject of the West India intercourse that he wanted to see me, but I availed myself of the interview to broach to him this of the fisheries. The suggestions of your letter of the 9th of September had placed the expediency of an application from me to him upon a ground so unexceptionable, that I determined to act upon them whenever an opportunity threw itself in my way. I asked him, when our other business was done, whether he had heard any thing of France being about to drive us away from the western coast of Newfoundland, where he would recollect we had the right to fish under his convention of 1818? He received the communication as if new to him. I told him that although I had no inti-



mation from my government on the subject, I had heard from you that France probably intended to set up such a claim. He inquired upon what grounds, upon which I gave him an outline of what they would probably be, as made known in your letter of the third of August, as well as of our grounds of resistance to the claim, drawn from the same source. He took down the treaty of 1783, and after looking into it pronounced the claim, as it struck him at first blush, to be altogether untenable. Neither the treaty or the declaration, he said, afforded any countenance to the doctrine or inference that Britain had lost her concurrent right to fish on that coast. The declaration, in particular, he thought excluded any such inference, being obviously coupled with the treaty of Utrecht, as its substratum, and only intended in a spirit

of accommodation to France. We went through the words of it, and you will naturally conclude that I said what I could to strengthen his impressions.

Having mentioned the subject to Mr. Robinson in this general way, it is not my present intention to go forward in it any further with this government, unless instructed by our own. Having apprised the Secretary of State of our correspondence, I may expect to hear from him before very long, should he deem it necessary, and in the meantime I will not omit to furnish you with whatever further matter I may be able to command.

I will ask the favor of you to acknowledge by a single line the receipt of this letter, which I shall reserve for a private hand, as soon as it may get to you; a request that I would not make but for the uncertainties that

seem to attend the conveyance of letters in France, and that I may forward a duplicate if I do not hear of its arrival in a reasonable time after it shall have been sent.

I remain dear sir with great  
attachment & respect your  
faithful and obt. svt.

RICHARD RUSH.

P. S. I received, on the 21st instant, your letter of the 12th, enclosing the one to the Secretary of State from Mr. Shaler, on our affairs with Algiers.

of let-  
rward  
ts ar-  
shall

ur

H.

in-  
clos-  
tate  
with